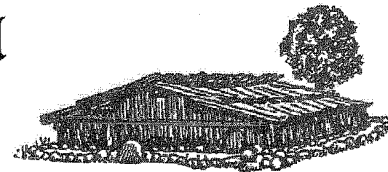


Hoopa Valley Tribal Council

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LEONARD E. MASTEN JR
CHAIRMAN

January 27, 2011

By email: deltaplanscoping@deltacouncil.ca.gov

Ms. Terry Macaulay
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814 32

Re: NOTICE OF PREPARATION DRAFT ENVIRONMENTAL IMPACT REPORT FOR THE DELTA PLAN--Scoping Comments of Hoopa Valley Tribe

Dear Ms. Macaulay:

We are writing in response to the referenced notice to provide comments on the scope of the Environmental Impact Report (EIR) to be prepared for the Bay Delta Conservation Plan planning process.

The purpose of these comments is ensure that the Bay Delta Conservation Plan excludes all water developed by the Trinity Division of the Central Valley Project (CVP) that Federal and State law, regulations, contracts, permits and judicial and administrative decisions relating to the operation of the Trinity Division require be retained for use in the Trinity River Basin. (Collectively, these authorities constitute the Law of the Trinity River.)

Section 85023 of the Water Code established the "coequal goals" of "providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem." Components of a Delta Plan include flow criteria for ecosystem protection, water supply conveyance facilities, and habitat restoration.

The notice states that the geographic scope of the EIR encompasses primary and secondary planning areas. The secondary planning area includes watersheds that contribute flows to the Delta, and specifically includes flows contributed by the Trinity River watershed.

Background

In its natural course, the Trinity River--the largest tributary of the Klamath River--flows through the Hoopa Valley Reservation. It is the source of the fishery on which the Hoopa Valley Tribe

has depended since time immemorial and in which it has vested property rights established under Federal statutes, judicial decisions and administrative action. The U.S. Bureau of Reclamation currently diverts an annual average 53 percent of the Trinity River's flow at Lewiston, CA from the Klamath basin, through the Trinity Division and into the Sacramento River watershed. Trinity Division diversions have made possible irrigation in both the Sacramento River Valley as well as south of the Delta in the San Joaquin River Valley. Those diversions have nearly destroyed the Trinity River fishery. As discussed below, the Secretary of the Interior is under a Federal mandate to restore the Trinity River fishery pursuant to the Federal trust responsibility for the Tribe's fishery resources.

The Law of the Trinity River makes the following separate and distinct volumes and uses¹ of Trinity River water unavailable for use in a Delta Plan.

1) Annual flow releases from CVP Trinity Division facilities, both as to volume and timing, provided for in the Trinity River Mainstem Fishery Restoration Record of Decision (ROD) issued December 2000 by the Secretary of the Interior with the concurrence of the Hoopa Valley Tribe pursuant to the Central Valley Project Improvement Act (CVPIA), Public Law 102-575 §3406(b)(23), the fishery restoration authority cited therein (Pub. L. 98-541 (1984) as amended by Pub. L. 104-143(1996)), and the Act of August 12, 1955, 69 Stat. 719, that authorized the Trinity Division (1955 Act).

2) Annual, scheduled releases from the Trinity Division of not less than 50,000 acre-feet to be made available to the County of Humboldt, CA and downstream water users, including the Hoopa Valley Tribe, as provided by: section 2 of the 1955 Act.

3) Storage in Trinity River Division facilities to ensure the maintenance of water temperatures required for the restoration, preservation and propagation of the Trinity River fishery.

4) The county of origin rights of Trinity County.

The following summarizes why those supplies are unavailable to the Delta planning process.

¹ In addition to the restrictions on diversion of water developed by the Trinity River Division, the waters of the Trinity River are subject to the rights of the Hoopa Valley Tribe under the federally reserved rights doctrine. The Tribe's reserved right vested at the creation of the Hoopa Valley Reservation. The right attaches to water to fulfill the present and future needs of the Hoopa Valley Reservation. To date the right has not been quantified or adjudicated. In this regard, the State Water Rights Board made all permitted uses of water by the Trinity Division in its 1959 Permit No. 11968 "SUBJECT TO VESTED RIGHTS."

A. Tribal Rights

The Hoopa Valley Tribe's Federal reserved fishing rights are associated with the ROD flow releases. Those rights are confirmed in:

- 1) Opinion M-36979 of the Solicitor, U.S. Department of the Interior (October 4, 1993) (The establishment of the Hoopa Valley Reservation included a reserved right to fishery resources.)
- 2) CVPIA section 3406(b)(23) (In order to meet the Federal trust responsibility to the Hoopa Valley Tribe develop and implement a fishery restoration program with the concurrence of the Hoopa Valley Tribe.)
- 3) National Oceanic and Atmospheric Administration (NOAA) Final Rule 58 Fed. Reg. 68063 (December 23, 1993) (Rule recognizing the Federal reserved fishing right of the Hoopa Valley Tribe as expressed in Opinion M-36979 is applicable law governing implementation of the Secretary of Commerce's fishery management responsibilities under the Magnuson Act.)
- 4) Parravano v. Masten, 70 F.3d 539 (9th Cir. 1995) (Upholding Opinion M-36979, the NOAA Final Rule, and reiterating the government-wide Federal trust responsibility for the Hoopa Valley Tribe's fishing rights.)
- 5) Westlands Water Dist. v. U.S. Dept. of Interior, 376 F.3d 853 (9th Cir. 2004) (Affirming the Trinity Restoration ROD). In Westlands, the court noted with approval the explicit statement of the Bureau of Reclamation's Federal trust responsibility for the fishing rights of the Hoopa Valley Tribe in section 3406(b)(23) of the CVPIA. 376 F. 3d 853, 877. (9th Cir. 2004).

As a part of its harms-balancing analysis, the district court concluded that "the government is also in breach of its general and specific independent federal trust obligation to the Hoopa and Yurok Tribes." Order, 275 F. Supp. 2d at 1232. It also stated that the purpose of the CVPIA § 3406(b)(23) was to "fulfill[] the federal government's trust obligation to the Indian Tribes." These statements are significant in that they provide support for the court's order implementing portions of the Preferred Alternative as injunctive relief.

Id. at 1234.

B. Trinity Division Authorization

Section 2 of the 1955 Act generally provides for the Trinity Division to be integrated operationally and financially (with respect to capital repayment and operation and maintenance costs) with the other units of the Central Valley Project. However, because the Trinity Division is the only unit of the CVP that imports water to the Central Valley, Congress included in section 2 unique area-of-origin protections for the Trinity River basin by including exceptions to the "integration" requirement. The first requires that the Secretary determine the flow releases to the Trinity River necessary for the preservation and propagation of Trinity River basin fish and wildlife, subject to a statutory minimum release. That proviso is a basis for the Trinity River ROD flows determined by the Secretary in 2000 with the concurrence of the Hoopa Valley Tribe as required by section 3406(b)(23) of the CVPIA. The ROD flows are a permanent limitation on diversions. They may not be changed without the consent of the Hoopa Valley Tribe.

The second exception of the 1955 Act states:

That not less than 50,000 acre-feet shall be released annually from the Trinity Reservoir and made available to Humboldt County and downstream water users.

That mandate requires the annual 50,000 acre-feet release from the Trinity Division to be made in such a way that the water will be available for use by Humboldt County and downstream users. In other words, the 50,000 acre-feet comes with the attributes of Trinity Division storage, regulation and scheduling.

C. State Water Board Permits

The State of California issued a number of permits for the Trinity Division. Permit 11968 includes 3 conditions that limit diversions.

1) Permit Condition 8 pertains to Trinity Division fishery flow releases.

2) Permit Condition 9 states "Permittee [Bureau of Reclamation] shall release sufficient water from Trinity and/or Lewiston Reservoirs into the Trinity River so that not less than an annual quantity of 50,000 acre-feet will be available for the beneficial use of Humboldt County and other downstream users."

3) Permit Condition 10 states: "This permit shall be subject to the prior rights of the county in which the water sought to be appropriated originates to use such water as may be necessary for the development of the county, as provided in Section 10505 of the Water Code of California."

D. Federal Contract

A June 19, 1959 contract between the Bureau of Reclamation and the County of Humboldt permanently memorializes the 50,000 acre-feet allocation and implements Permit Condition 9 above.

Discussion

First, it is not clear whether or how the Delta Plan planning process is accounting for the ROD flows and Trinity County's county of origin rights. Moreover, the Hoopa Valley Tribe is informed by the Bureau of Reclamation that in the Delta planning process, Reclamation and the State are assuming that the 50,000 acre-feet of water is available for diversion to the Central Valley. This is unlawful.

In 1979 the Solicitor of the Department of the Interior reviewed the legal status of the fishery flow releases and the 50,000 acre-feet of water developed and controlled by the Trinity Division. The Solicitor wrote:

On occasion the Congress has specifically limited the Secretary's discretion in meeting the general CVP priorities. For example, in authorizing the Trinity River Division of the CVP in 1955, Congress specifically provided that in-basin flows (in excess of a statutorily prescribed minimum) determined by the Secretary to be necessary to meet in-basin needs take precedence over needs to be served by out-of-basin diversion. See Pub. L. No. 84-386, §2. In that case, Congress' usual direction that the Trinity River Division be integrated into the overall CVP, set forth at the beginning of section 2, is expressly modified by and made subject to the provisos that follow giving specific direction to the Secretary regarding in-basin needs.

Memorandum opinion from the Solicitor to the Assistant Secretary, Land and Water Resources 3-4 (December 7, 1979) (1979 Opinion). Thus, under Federal law, the ROD flows and 50,000 acre-feet releases are unavailable for diversion to the Central Valley.

Second, the Federal agency status update (Update) about the Bay-Delta planning process published by the Department of the Interior on December 15, 2010, states that the Bay Delta's ecology, water infrastructure, and water management practices are "unsustainable" and have "reached a dangerous tipping point." Update at 2. However, to address this situation, the Update describes planning assumptions and proposed actions that are in conflict with the aforementioned limitations on exportation of Trinity River water to the Central Valley.

The Update announces that there have been “great strides to identify a science-based solution that calls for the separation of water needed to sustain the Bay-Delta itself from water conveyed to south-of-Delta farms and cities.” Update at 3. Then the Update states, with emphasis added:

The good news is that preliminary modeling results summarized in the State’s BDCP Highlights suggest that a new facility can be operated in a manner that would generate average annual water exports over the long term that are more reliable and greater, than the average annual exports that would be achievable under current constraints. For context, this modeling also suggests that these quantities may be comparable to the average annual Delta exports that have occurred since the Bay-Delta Accord, 15 years ago.

However, the Bay-Delta Accord predates the 2000 Trinity River Restoration Record of Decision (ROD), which diminishes Trinity River Division diversions by an annual average of 250,000 acre-feet. Moreover, neither the Bay-Delta Accord nor present CVP operations accounts for the 50,000 acre-feet of additional releases required by the Trinity Division Act of August 12, 1955, 69 Stat. 719. Thus, there are 300,000 acre-feet of CVP yield included in the Bay Delta Accord that will not be available for use in the new Plan. It is essential to clarify now what Trinity River water is unavailable for a Delta Plan. The need to do so is underscored by the recent efforts by the Central Valley cities of Woodland and Davis to obtain a permit from the State Water Resources Control Board for an allocation of 45,000 acre feet of water from the Sacramento River. On January 18, 2011 the Sacramento Bee reported that the allocation would have a value of \$325 million to the cities but added that

awarding a new water right to Woodland and Davis could have dire effects on the Sacramento-San Joaquin Delta downstream. Numerous fish species in the Delta and the Sacramento River are imperiled, including salmon.

A report last year, also by the State Water Resources Control Board, estimated that it might be necessary to double flows in the Sacramento River during some seasons to restore fish populations.

This would require many current water users to take less water from the river. And it could make new water rights very difficult to justify.

So long as the Delta Plan does not confirm that the 50,000 acre-feet entitlement for the Trinity Basin is unavailable to the Central Valley, what is now perceived as a 45,000 acre-feet issue effectively becomes a 95,000 acre-feet deficit for the Delta Plan.

Third, implementation of a Bay-Delta Conservation Plan will come at considerable cost. The Update at page 13 states, with emphasis added:

Current estimates place the costs of the new north Delta diversion and conveyance facility in the neighborhood of \$13 billion. The proposed plan would call for State and Federal water contractors to pay those costs. The State currently anticipates that the State and Federal governments would pay for certain elements of the habitat restoration program, for which the costs are currently estimated to be about \$3.3 billion. The Federal government must review the components of any proposed plan and understand the costs and benefits such a plan would have on Federal water resources in California and on Federal taxpayers.

We understand that the Plan's costs include those for conservation measures, including construction, operation, administration, and research.

In order for all levels of government to "understand the benefits and costs" of a Bay-Delta Plan, they need to know what financial obligations contractors already have. For that reason, we request that you ensure that any Delta Plan benefit-cost analysis fully accounts for, preserves, and enforces CVP contractors' statutorily required financial obligation for environmental restoration associated with construction and operation of the Trinity River Division. Of particular concern are the costs of Trinity River restoration activities. In 2007, the Secretary of the Interior, in consultation with the Tribe, determined that the annual cost of Trinity River restoration will be \$16.4 million through construction and \$11 million annually thereafter for so long as diversions of Trinity River water occur.

EIR Public Hearings

We request that of the hearings that may be scheduled by the Delta Stewardship Council for consideration of a Delta Plan at least one be held in the Trinity River basin.

Summary

No further planning for the Bay-Delta should occur that assumes the availability for diversion any Trinity River water resources that are committed by law to the Trinity River Basin and its communities. The EIR should preclude the availability for use in a Delta Plan water allocated to: the ROD flow releases; the 50,000 acre-feet of additional Trinity Division water for Humboldt County and downstream users; the carryover storage for preservation of temperatures needed for the Trinity River fishery; or the area of origin rights of Trinity County.

Sincerely,



Leonard E. Masten, Jr.

Chairman, Hoopa Valley Tribe

cc: Honorable Dianne Feinstein
Honorale Barbara Boxer
Honorale Mike Thompson
Secretary of the Interior
Secretary of Commerce
Director, Office of Management and Budget
Don Glaser, USBR
Ren Lohofener, USFWS
Amy Dutschke, BIA
Rod McInnis, NMFS
Will Stelle, NMFS
Don Chapman, Native American Affairs

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